Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

ANTHONY EDWARD KESTLER
Petitioner,

v.

BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM,
Respondent

Petition for Writ of Certiorari to the Fourth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a Federal Court of Appeals Bound by a Ruling of the State Court of Last Resort Which Has Ruled as a Matter of State Law that a Disabled Police Officer's Right to Specific Benefits Under Local Government Employment Contracts "Vests Upon Completion of Five Years of Creditable Service" and Not Upon the Happening of a Subsequent Event such as the Occurrence of Disability or Separation from Service?

LIST OF PARTIES

A. Plaintiff/Petitioner

Anthony Edward Kestler:

A citizen of the United States residing in Mecklenburg County, North Carolina, who is a former police officer who became disabled in the line of duty and who is receiving disability pension from the State of North Carolina through the defendants.

B. Respondents/Defendants

North Carolina Local Governmental Employees' Retirement System:

A North Carolina corporation which implements the pension plan of the plaintiff/petitioner.

Board of Trustees of the North Carolina Local Governmental Employees' Retirement System:

A body politic and corporate; the governing body of the North Carolina Local Governmental Employees' Retirement System.

Dennis Ducker:

Director of the North Carolina Local Governmental Employees' Retirement System (in his official capacity).

Harlan E. Boyles:

Treasurer of the State of North Carolina and Chairman of the Board of Trustees for the North Carolina Local Governmental Employees' Retirement System (in his official capacity).

The State of North Carolina

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No.

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BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM,
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Petition for Writ of Certiorari to the
Fourth Circuit Court of Appeals

Anthony Edward Kestler respectfully petitions for a Writ of Certiorari to review the judgment of the Fourth Circuit Court of Appeals.

OPINION BELOW

The Opinion of the Fourth Circuit Court of Appeals is reported at 48 F.3d 800 (1995). App. at A-1. The denial of the Petition for Rehearing *En Banc* was denied on April 28, 1995. App. at A-12. That opinion reversed the decision

of the Federal District Court for the Western District of North Carolina, reported at 808 F.Supp. 1220 (W.D.N.C. 1992). App. at A-16. (Judgment enjoining the State, app. at 14).

JURISDICTION

The Fourth Circuit Court of Appeals rendered its decision February 23, 1995. A Petition for Rehearing *En Banc* was denied on April 28, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the District Court was 42 United States Code § 1982 and appeal to the court of appeals was made by the defendants pursuant to Rule 3 of the Federal Rules of Appellate Procedure.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Contract Clause of the United States Constitution provides in pertinent part that, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. Const. art. I, § 10, cl. 1

The maintenance of annuity reserves and pension reserves as provided for, and regular interest creditable to the various funds as provided in North Carolina General Statute § 128-30, and the payment of all pensions, annuities, retirement allowances, refunds and other benefits granted under the provisions of this Article, are hereby made obligations of the pension accumulation fund. All income, interest and dividends derived from deposits and investments

authorized by this Article shall be used for the payment of said obligations of the said fund. N.C. Gen. Stat. § 128-35

Pertinent portions of the North Carolina General Statutes governing the pension funds for police officers appear in the appendix as exhibits to the Stipulation. App. at 35. N.C. Gen. Stat. § 143-166 *et. seq.*

STATEMENT OF THE CASE

A. Procedural Background and How the Federal Question Was Presented

The defendants are fiduciaries responsible for overseeing the statutorily based pension plans for state employees. Anthony Edward Kestler sued the North Carolina Retirement System in the Western District of Federal Court on July 12, 1991 complaining that reductions in his pension benefits, after he became vested in the program, violated the Contract Clause of the United States Constitution. The trial judge allowed judgment for Kestler on this basis and enjoined the State from enforcing the earnings cap. App. at A-14. The State of North Carolina appealed and a divided panel on the Fourth Circuit reversed the trial court. App. at A-01. A divided panel also denied Kestler's Petition for Rehearing *En Banc.* App. at A-12. The trial judge, Judge Graham Mullen, and Circuit Judge Hall in his dissent relied on the 1988 North Carolina Supreme Court case of *Simpson v. Government Employees Retirement System,* 88 N.C. App. 218, 363 S.E.2d 90 (1987), *aff'd per curiam,* 323 N.C. 362, 372 S.E.2d 559 (1988). Circuit Judges Widener and Russell relied on the 1987 North Carolina Court of Appeals antedated decision of *Griffin v. The Board of Commissioners of the Law Enforce-*

ment Officers' Benefit and Retirement Fund, 84 N.C. App. 443, 352 S.E.2d 882, *appeal dismissed,* 319 N.C. 672, 352 S.E.2d 776 (1987).

B. The History of the Retirement Pension Plan for Disabled Police Officer Anthony Edward Kestler

The facts of the case were stipulated by the parties at the trial level. (The stipulations appear at app. at A-35). Anthony Kestler joined the Mecklenburg County Police Department in 1974. The State of North Carolina agreed to provide him with a pension plan, after he had been on the force for five years, which included disability retirement. In summary, the disability provisions provided that if an officer was injured and permanently disabled, he would receive disability income from the State. This disability income was to be paid unless the officer was able to return to the performance of his duties *as a police officer.* Like many private disability policies, the amount of the disability payments was not reduced even if the disabled officer could earn income in an occupation other than his law enforcement profession.

Although the name of the plan changed several times, the benefits described above did not change until 1980, after officer Kestler had become vested in the plan. (Stip. ¶¶ 8,14, app. at A-38, A-40) In 1980, the North Carolina Legislature ratified a bill which placed a limitation or cap on the amount of earnings a disabled officer could earn in another occupation and still receive his full disability benefits. (Stip. ¶ 9, app. at A-38).

Officer Kestler became injured in the line of duty in 1985 and was declared permanently and totally incapacitated

for the further performance of duty as a law enforcement officer with the Mecklenburg County Police Department on February 18, 1986. (Stip. ¶16, app. at A-41). He was unable to continue his law enforcement career. Although he had only been educated and trained as a police officer, and despite his disability, he eventually found employment in other occupations to help support his family. (Stip. ¶ 17, app. at A-41) Until 1991, he never earned enough income to exceed the maximum allowed under the earnings limitation. (Stip. ¶ 18, app. at 42).

Under the modified disability plan, each year disabled employees were required to report the amount of any outside income to the State. If it exceeded the earnings limitation imposed by the statute, the employee was required to refund a portion of the disability pension. (Stip. ¶ 9, app. at A-40).

The contractual obligation to pay Kestler the full benefits of the pension plan is set forth, in part, in N.C. Gen. Stat. § 128-35. Kestler contends that the earnings limitation imposed by the statute after he became vested is a violation of the contract clause of the United States Constitution. U.S. Const. art. I, § 10, cl. 1.

REASONS FOR GRANTING THE PETITION

I. The Fourth Circuit Court of Appeals Decided a Federal Constitutional Question of Impairment by State Statute of Petitioner's Retirement Contract in a Manner Contrary to the Court of Last Resort of the State of North Carolina.

In 1987 and 1988, the state courts of North Carolina addressed similar issues of whether the state legislature could reduce pension benefits of vested state or local governmental employees. In a matter of eight months, the North Carolina Court of Appeals rendered two decisions. The first was *Griffin v. The Board of Commissioners of the Law Enforcement Officers' Benefit and Retirement Fund,* 84 N.C. App. 443, 352 S.E.2d 882, *appeal dismissed,* 319 N.C. 672, 352 S.E.2d 776 (1987). The second was *Simpson v. Government Employees Retirement System,* 88 N.C. App. 218, 363 S.E.2d 90 (1987) *aff'd per curiam* 382 S.E.2d 559 (N.C. 1988). At first glance, the two opinions are seemingly irreconcilable.

The facts in *Griffin* are as follows: In September, 1981 Griffin, a disabled, retired Mecklenburg County law enforcement officer, began receiving disability retirement payments from the Law Enforcement Officers' Benefit and Retirement Fund established by North Carolina General Statute § 143-166, *et. seq.* Because he had certain other earnings during 1982, in April 1983 the state retirement system demanded, under the authority of § 143-166(y), that Griffin return a certain amount of the money that he received from the fund that year. Griffin paid the demanded sum under protest and brought a suit to recover it. In the complaint he alleged that the provisions of § 143-166(y) did not apply to him because he was injured, although not declared disabled, before the enactment of the statute reducing his pension disability benefits.

The Court of Appeals ruled against officer Griffin. In a brief opinion, the Court in *Griffin* held:

> The legislation that first reduced the benefits of future disability retirees who work and earn money was enacted in 1980, more than a year before plaintiff retired, and *we know of no authority for the proposition that plaintiff's retirement rights vested before then.* The decisions that plaintiff relies upon involved employees whose benefits were reduced after their retirement, which is not plaintiff's situation, and a discussion of those authorities would serve no purpose.

84 N.C. App. at 445, 352 S.E.2d at 884. (emphasis added). *Griffin* was eventually settled and the case dismissed by the North Carolina Supreme Court. 319 N.C. 672, 352 S.E.2d 882 (1987).

The facts in *Simpson* are as follows: The plaintiff, Simpson,[1] was a former fireman for the City of Greensboro who qualified for disability benefits under the Retirement System. Mr. Simpson became a vested member of the Retirement System by August 6, 1969 and qualified for disability benefits on March 1, 1983.[2] Eighteen months before fireman Simpson became disabled, and fourteen years after he became vested, the General Assembly modified the

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[1] *There were actually two plaintiffs in Simpson; the plaintiff Moore, had identical claims.*

[2] *Although the pension statute cited in Simpson was different than that cited in Griffin, the pertinent language of the statutes is identical and the pension plans were identical. The State does not contend there is a difference in the statutory scheme of the disability plans.*

statutory pension plan on October 9, 1981 and reduced the disability benefits for the state employees, including the vested employees. The gravamen of Simpson's complaint was that he was entitled to have his disability retirement benefits calculated according to the more favorable benefits in effect at the time he became a vested member of the retirement system. The Court held that fireman Simpson's right to his promised retirement vested after five years of creditable service and that retirement could not be adversely modified unless the tests in *United States Trust Co. v. New Jersey,* 431 U.S. 1 (1977) had been met. 88 N.C. App. at 224, 363 S.E. 2d at 94.

The petitioner, Kestler, contends the Fourth Circuit relied on *Griffin* from the North Carolina Court of Appeals which was supplanted eight months later by *Simpson. Simpson,* unlike *Griffin,* was affirmed *per curiam* by the North Carolina Supreme Court and has since been cited as controlling authority.[3]

It is clear from the opinion in *Kestler* that the Fourth Circuit struggled with the decision as to whether to rely on *Griffin* or *Simpson* in making its decision. "It is apparent from reading *Griffin* and *Simpson* that the holdings may be inconsistent. . ." 48 F.3d at 804. The majority chose to follow *Griffin* while Circuit Judge Hall, in his dissent, and the trial judge agreed that *Simpson* was controlling.

Reduced to its simplest terms, officer Griffin contended that the legislatively imposed earnings cap in the state retirement plan was unconstitutional. Fireman Simpson challenged the same basic retirement plan, but he

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[3] *See discussion infra at page 13*

challenged the fact the legislature adversely changed the formula used to calculate his disability benefits. Both officer Griffin and fireman Simpson had vested in their retirement plan at the time the onerous legislation was enacted.

A. The Time of Vesting of Retirement Benefits Under Employment Contracts Between Local Governments and Public Employees in North Carolina was Decided as a Matter of Law by the North Carolina Supreme Court on 6 October 1988 in the Case of *Simpson v. Government Employees Retirement System*, 88 N.C. App. 218, 363 S.E.2d 90 (1987), *aff'd per curiam*, 323 N.C. 362, 372 S.E.2d 559 (1988) Affirming the Decision of the Intermediate Appellate State Court.

Apparently because *Griffin* dealt with the earnings cap and *Simpson* dealt with the disability formula, the Fourth Circuit mistook *Griffin* as controlling the issues raised by *Kestler.*[4] However, as Judge Mullen pointed out in his District Court opinion, "[I]t is apparent that *Griffin* did not address the issue which is presented in both *Simpson* and in the present case." 808 F. Supp. at 1226.

Officer Griffin had become injured before the enactment of the statute which reduced his benefits but was not declared disabled until after the statute was passed. Officer

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[4] *[W]e are of the opinion that we should follow Griffin, a case on facts so similar to the case at hand to be indistinguishable." 48 F.3d at 804.*

Griffin argued that the statutes and policies in effect at the time he was *injured* controlled his retirement benefits, not the date of his disability.[5] The Court in *Griffin* wrote, "[W]e know of no authority for the proposition that plaintiff's retirement rights vested before [he was declared disabled]." *Griffin* at 445, 352 S.E.2d at 884. The "authority" which was absent in *Griffin* was established in *Simpson,* decided just eight months later.

In *Simpson* the Court of Appeals, stating this was a case of "first impression," addressed the issue of when does a participant of the state retirement plan become vested? If vested, an employee's benefits could not be reduced without a compelling reason under the test set forth by this Court in *United States Trust Co. v. New Jersey,* 431 U.S. 1 (1977). In a lengthy discussion, the *Simpson* Court stated:

> A public employee has a right to expect that the retirement rights bargained for in exchange for his loyalty and continued services, and continually promised him over many years, will not be removed or diminished. Plaintiffs, as members of the North Carolina Local Governmental Employees' Retirement System, *had a contractual right to rely on the terms of the retirement plan* as

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[5] *This is a different vesting issue than that raised in Simpson and Kestler although the majority believed the issues were identical. Officer Kestler contends he was vested before the statute was amended decreasing his benefits. He was not injured and disabled until after the passage of the statute. However, because he was vested, the state could not deprive him of his full disability benefits. See Simpson supra at page 8.*

> these terms existed *at the moment their retirement rights became vested.*

Id. at 224, 363 S.E. 2d at 94. (emphasis added) With this holding in *Simpson,* the majority should have reached its conclusion that *Griffin* was *not* controlling and sustained the trial court's decision.

B. The Court of Appeals is Obliged to Follow the Last Pronouncement of State Law as Proclaimed by the State's Court of Last Resort [i.e. *Simpson v. Government Employees Retirement System,* 88 N.C. App. 218, 363 S.E.2d 90 (1987), *aff'd per curiam,* 323 N.C. 362, 372 S.E.2d 559 (1988)] and not "the most analogous factual" comparison of Conflicting Case Decisions of Different Panels of the Lower Appellate Court Panels. (i.e. the Court of Appeals decisions in *Griffin v. The Board of Commissioners of the Law Enforcement Officers' Benefit and Retirement Fund,* 84 N.C. App. 443, 352 S.E.2d 882, *appeal dismissed,* 319 N.C. 672, 352 S.E.2d 776 (1987).

The majority in *Kestler* wrote, "It is apparent from reading *Griffin* and *Simpson* that the holdings of those two cases may be inconsistent . . ." 48 F.3rd at 804. However, the majority erroneously cites *Simpson* as being merely a North Carolina Court of Appeals decision. *Simpson* is cited as "*Simpson v. Government Emp. Retire. Sys.,* 88 N.C. App. 218, 363 S.E.2d 90 (1987)." It does not acknowledge the

North Carolina Supreme Court's review of the case in 1988. 323 N.C. 362, 372 S.E.2d 559 (1988).[6]

The *Griffin* opinion narrowly addressed the claims raised by Mr. Griffin which were that he was entitled to benefits which existed at the time of his injury, rather than at the time of his disability determination. However, the Court of Appeals in *Simpson,* in a six page opinion, thoroughly discussed all of the issues germane to the decision to be made in *Kestler.* The *Simpson* holding was then affirmed *per curiam* by the North Carolina Supreme Court. 323 N.C. 362, 382 S.E.2d 559 (1988). It has long been established in our jurisprudence that a *per curiam* opinion stands upon the same footing as those opinions containing a more extended discussion or more numerous citations of authority and has the same legal precedent as a full opinion rendered by the Supreme Court. *Bigham v. Foor,* 201 N.C. 14, 158 S.E. 548 (1931).

C. The Authority Not Followed by the Court of Appeals, *Simpson,* is (1) an Unambiguous Pronouncement of the Controlling Law on the Time of Vesting of Local Public Employee Retirement Benefits, (2) is the Last Statement of the Controlling Law, and (3) Has Since Being Issued Been Cited as Controlling Authority on at Least Two Occasions. *Griffin* Has Never Been Cited as Authority Except by the Fourth

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[6] *Simpson was correctly cited by Judge Hall in his dissent with reference to the North Carolina Supreme Court. Discretionary review was denied by the Supreme Court in Griffin, 319 N.C. 672, 356 S.E.2d 776 (1987).*

Circuit Court of Appeals in the Case *Sub Judice.*

In response to the majority's opinion that *Simpson* did not explicitly overrule *Griffin,* Circuit Judge Hall made a compelling argument.

> The [North Carolina Court of Appeals'] opinions in *Griffin* and *Simpson* were written by different three-member panels[7] of North Carolina's intermediate appellate court. The majority cites *Cole v. Cole,* 229 N.C. 757, 51 S.E.2d 491 (1949)] for the proposition that North Carolina requires a "clear and impelling inference" that an earlier case directly involving the same principle is being implicitly overruled.[8] While the opinion in *Simpson* may not have provided a sufficiently clear inference, its core ruling, and not *Griffin's,* was upheld when the same principle arose again in the same court five years later.

Judge Hall was referring to *Faulkenbury v. State Employees' Retirement System,* 108 N.C. App. 357, 424 S.E.2d 420 (1993). *Simpson* has also been cited by the North Carolina Supreme Court in *Bailey v. State Retirement*

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[7] *In a footnote, Judge Hall noted that North Carolina appellate judge Cozort sat on both panels but did not write either opinion.*

[8] *Cole was decided well before there was an intermediate appellate court in North Carolina. The Court of Appeals was created in 1967. 1967 Sess. Laws c. 108, s. 1 (codified at N.C. Gen. Stat. § 7A-16 (1969).*

System, 330 N.C. 227, 412 S.E.2d 295 (1991).[9] Both of these cases dealt with identical vesting issues as in *Kestler* in the same state retirement scheme. The Court in *Faulkenbury* not only cited *Simpson* but discussed the "guiding principle" behind their holding in *Simpson.*

> In *Simpson,* this Court held that the relationship between vested members of the pension fund and the Retirement System is contractual. *[Simpson]* at 223, 363 S.E.2d at 93. This is so, we reasoned, because a government retiree's pension is correctly characterized as deferred compensation to which the retiree is contractually entitled. *[Simpson]* at 223, 363 S.E.2d at 94. *Hence, a statute that diminishes the calculated benefits of an employee impairs that employee's contractual rights.*

Faulkenbury, 108 N.C. App. at 357, 424 S.E.2d at 426. (emphasis added) *Simpson* could not be more directly on point in the issues *sub judice.*

In contrast, *Griffin* has *never been cited as authority* until the Fourth Circuit's holding in *Kestler.* Ironically, *Griffin* was mentioned, then ignored, in *Simpson.*

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[9] *Actually, Simpson was also authority for the decision in Woodard v. NC Local Gov. Emp. Ret. Sys., 108 N.C. App. 378, 424 S.E.2d 431 (N.C. Ct. App. 1993) which was a companion case to Faulkenbury, and which adopted by reference the arguments advanced in that case.*

> Plaintiffs contend that an adverse change in the benefit structure after vesting constitutes an impairment of contractual rights. In response, defendants contend, first, that North Carolina case law either does not support plaintiffs' position, or controverts it, as in *Griffin v. Bd. of Com'rs. of Law Officers' Retirement Fund,* 84 N.C. App. 443, 352 S.E.2d 882, *disc. rev. denied,* 319 N.C. 672, 352 S.E.2d 776 (1987). Defendants claim *Griffin* stands for the proposition that the General Assembly can make changes in the disability retirement structure and apply those changes to members with vested rights who have not yet retired on disability retirement at the time the changes came into force.

The *Simpson* Court never mentions *Griffin* again and renders an opinion diametrically opposed, holding that the state's diminution of benefits impairs its obligation of contract and therefore the tests developed by this Court in *Trust* must be applied.

Griffin was correctly distinguished by Judge Graham C. Mullen in his District Court opinion and Judge Hall in his dissent to the majority's holding in *Kestler.*

D. The Fourth Circuit Relied on *Griffin* which has been Overruled by Implication, if not expressly, by *Simpson.*

As advanced by Judge Hall in his dissent, the clear and unambiguous reading of *Simpson* is that it overrules the holding in *Griffin.*

> There simply is no way to reconcile the holdings in *Griffin* and *Simpson*. Although noting that "[w]hile the principles involved in *Griffin* and *Simpson* are similar, they are not the same. . . ." *ante* at 9, the majority fails to identify any differences beyond those in the factual settings. The principles involved are precisely the same, and the holdings are diametrically opposite. *Griffin* holds that a retiree receives the level of pension benefits calculated in accordance with the statute in existence at the time he actually begins to receive the benefits, *i.e.* at retirement, while *Simpson* holds that it is the computation method in effect when the employee has met the service requirements for future benefits, *i.e.* before retirement, that determines what level of benefits he will receive. Each panel designated the pivotal moment as the point of "vesting." The resolution of the appeal before us depends on the answer to a single question: Which case do we follow?

48 F.3d at 805. Judge Hall then reasons that because other North Carolina cases have been decided under *Simpson*, not *Griffin*, that *Simpson* is clearly controlling.[10] This Petition respectfully suggests that the Fourth Circuit in interpreting state law should also be persuaded by the precedent established in *Simpson* and render an opinion consistent therewith.

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[10] *See Faulkenbury v. Teachers' and State Employee's Retirement System of N.C., 424 S.E.2d 420, 426 (N.C. App. 1993).*

II. The North Carolina Supreme Court's Affirmance *per curiam* of Simpson Adopting the Holding of the United States Supreme Court in Trust Relating to Impairment of the Obligations of Contract and Determining the Time of Vesting of Employment Contract Rights of Retired Public Employees, the Contrary Holding of the Federal Court of Appeals Creates Problems of *Stare Decisis* and Federalism in Numerous Other Pending Cases by North Carolina Public Retirees in State and Federal Court.

If this Court allows *Griffin* to stand as the controlling law in this area, it will subvert its holding in *United States Trust Co. v. New Jersey,* 431 U.S. 1 (1977) where Justice Blackmum, writing for the Court said, "It long has been established that the Contract Clause limits the power of the States to modify their own contracts as well as to regulate those between private parties." *Fletcher v. Peck,* 6 Cranch, 87, 137-139, 3 L.Ed. 162 (1810). If the states are allowed to diminish the rights of vested government employees without accountability for their actions, the tests for such state action as developed in *Trust,* and the very Contract Clause of the United States Constitution, are rendered meaningless.

Griffin stands for the proposition that North Carolina can modify its pension contract with its employees at any time prior to the employees' retirement, despite the fact that its loyal employees have received a vested promise of certain benefits. Under the rationale in *Griffin,* the state could choose to completely dissolve or abandon the pension rights of its employees if it does so at any moment prior to

the employee's retirement - regardless of the length of service or relied upon promises of benefits.

The petitioner further urges the Court to allow his petition because of the import of the holding in this matter. There is much litigation in our state which has been filed based on the precedent in *Simpson.* Those cases include the following: *LaBroad v. State Retirement System, 3:94CV210McK* (pending in the Western District of Federal Court for North Carolina) (class certification pending); *Faulkenbury v. Teacher's Retirement,* 5:94-CIV-464-BO1 (class action pending in the Eastern District of Federal Court of North Carolina); *Woodard v. Retirement System,* 5:94-CIV-463-BO2 (class action pending in the Eastern District of Federal Court of North Carolina). *Faulkenbury v. Teacher's Retirement,* 90 CVS 12090 (class action pending in Wake County, North Carolina); *Woodard v. Retirement System,* 91 CVS 00368 (class action pending in Wake County); *James H. Pou Bailey, et al. v. State of North Carolina,* 92 CVS 10221 (pending in Wake County); *Peele* v. *Teacher's Retirement,* 92 CVS 11978 (class action pending in Wake County); and *Wheaton v. Retirement System,* 94 CVS 08212 (class action pending in Wake County).

All of these cases have issues which may be adversely affected by the Fourth Circuit's decision to follow *Griffin* rather than *Simpson;* therefore, there is a compelling reason to be certain that the correct law is applied to the facts in *Kestler.* It is imperative that the Court consider this matter in light of the most recent and controlling precedent in our state.

CONCLUSION

Impairment of contracts by state law must necessarily be decided on a case-by-case basis. When the court of appeals has jurisdiction over a federal question based in part on state law, the federal court is absolutely bound to follow the local law as pronounced by that state's court of last resort. Factually similar cases may be instructive, but once the law is determined, under principles of *stare decisis* all subsequent cases must be decided on that law. Federalism is a "two-way street."

Officer Kestler, for the special and important reasons above stated and because of uncertainty created by the Court of Appeals, respectfully moves that this Court, in its discretion, grant the Writ necessary for full judicial review on the merits that control this case, numerous other pending cases in state and federal courts, and the constitutional and property rights of over 250,000 active and retired members of the public retirement systems of North Carolina.

This the 27th day of July, 1995.

Fred W. DeVore, III
DEVORE AND ACTON, P.A.
Attorney for the Petitioner
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APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

ANTHONY EDWARD KESTLER,
Plaintiff-Appellee,

v.

BOARD OF TRUSTEES OF NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, A Body Politic And Corporate; DENNIS DUCKER, Director of the North Carolina Local Governmental Employees' Retirement System (in his official capacity); HARLAN E. BOYLES, Treasurer Of The State Of North Carolina And Chairman Of The North Carolina Local Governmental Employees' Retirement System (in his official capacity),
Defendants-Appellants,

and

NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, A Corporation; STATE OF NORTH CAROLINA,
Defendants.

No. 93-1123

Appeal from the United States District Court
for the Western District of North Carolina, at Charlotte.
Graham C. Mullen, District Judge.
(CA-91-221)

Argued: October 26, 1993

Decided: February 23, 1995

Before RUSSELL, WIDENER, and HALL, Circuit Judges.

Reversed and remanded by published opinion. Judge Widener wrote the majority opinion, in which Judge Russell joined. Judge Hall wrote a dissenting opinion.

COUNSEL

ARGUED: Alexander McClure Peters, Assistant Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellants. Fred William DeVore, III, DEVORE & ACTON, P.A., Charlotte, North Carolina, for Appellee. **ON BRIEF:** Michael F. Easley, Attorney General of North Carolina, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellants.

OPINION

WIDENER, Circuit Judge:

The plaintiff, former Mecklenburg County Police Officer Anthony Edward Kestler, brought this action pursuant to 42 U.S.C. § 1983 alleging that the defendants, the Board of Trustees of North Carolina Local Government Employees' Retirement System (Retirement System) and the Retirement System's director, Dennis Ducker, and treasurer, Harlan E. Boyles (the defendants), unconstitutionally impaired his contractual rights in violation of the Contract Clause, U.S. Const., Art. I, § 10, para. 1, by imposing a limit on the amount of income he could earn without reducing the disability retirement benefits he was collecting due to a work related injury. The defendants appeal from

the district court order declaring the Retirement System's cap on earnings for disability beneficiaries unconstitutional and enjoining its enforcement. *Kestler v. North Carolina Local Governmental Employees' Ret. Sys.*, 808 F.Supp. 1220 (W.D.N.C. 1992). We reverse.

The parties stipulated to many of the pertinent facts of this case. Kestler joined the Mecklenburg County Police Department in 1974 and became a participant in its retirement program, then known as the Law Enforcement Officers' Benefit and Retirement Fund (LEOBRF). Effective July 1, 1979, a police officer needed five years of creditable service in order to qualify for an unreduced retirement benefit at age 55 for members who were no longer law enforcement officers and who left their personal pension contributions in LEOBRF. 1979 Sess. Laws, C. 838, § 101, codified at N.C. Gen. Stat. 143-166(j) In § 102 of the same amendment, Section 143-166(y) was changed to provide that any officer:

> less than 55 years of age with five or more years of creditable service and who has been totally and permanently incapacitated for duty . . . may be retired . . . on a basic disability retirement allowance. . . .
>
> Under such rules and regulations as are otherwise adopted by the board of commissioners, a member eligible for a basic disability retirement allowance shall receive a disability retirement equal to one and fifty-five hundredths percent (1.55%) of his average final compensation calculated as the average annual compensation of a member during the four consecutive years of membership service producing the highest such average multiplied by the number of years of creditable service which he would have had if he had continued in service until his 55th birthday.
>
> The board of commissioners shall implement the provisions of this subsection by the adoption of necessary and reasonable rules and regulations.

Although this provision contains a statutory formula for determining disability benefit amounts, it did not contain any limitation on income earned in addition to any disability benefits received. Therefore, when

Kestler reached five years of service on August 16, 1979, he became eligible, if disabled, to apply for disability retirement benefits, on which at that time there was imposed no earnings cap.

On June 24, 1980, the North Carolina General Assembly enacted 1979 Sess. Laws C. 1215, which, in pertinent part, amended N.C. Gen. Stat. 143-166(y) to include a requirement that any police officer, who received disability retirement benefits and earned income that, added together, made a total of more than what his final compensation was as a police officer, forfeited any benefits in excess of that total compensation that were not paid for on account of the employee's own contributions. This earnings cap became effective on July 1, 1980 for employees retiring after that date. 1981 Sess. Laws. C. 975 § 1 slightly modified the C. 1215 earnings cap formula and made it applicable only to those officers who retired on disability benefits after July 1, 1981. In 1983, the name of the retirement system was changed to the Law Enforcement Officers' Retirement System (LEORS).[1]

Beginning on January 1, 1986, the General Assembly repealed § 143-166[2] and transferred all members of LEORS to the North Carolina Local Government Employees' Retirement System (Retirement System), codified at N.C. Gen. Stat. § 128-27 *et seq.*[3] The earnings cap remained the same after this transfer, because then and now, N.C. Gen. Stat. § 128-27(e)(1) which governed the Retirement System contained the same earnings cap as the replaced separate police retirement system.

In October of 1985, Kestler fell while chasing a burglary suspect and injured his knee so severely that he was approved for disability retirement benefits, effective March 1, 1986, and has remained unable to perform his law enforcement duties. However, Kestler could still maintain gainful employment and did so to supplement his disability benefits, but never made enough so that the earnings cap reduced his benefits. In 1990 he obtained employment that might cause him to

[1]1983 Sess. Laws, C. 468, § 1.

[2]See 1985 Sess. Laws, C. 479, § 196(7).

[3]This transfer is codified at N.C. Gen. Stat. § 143-166.50(b).

exceed the earnings cap in 1991 with a corresponding reduction in his disability benefit amount. As a result, Kestler filed a declaratory judgment action on July 12, 1991, claiming, *inter alia*, that his interest in the disability plan was vested at the time the earnings cap became effective. He sought a determination that the earnings cap was an unconstitutional impairment of his contract in violation of the Contract Clause, U.S. Const., Art. I, § 10, para. 1, which provides that "No State shall . . . pass any . . . law impairing the obligation of contracts . . . ."[4]

On December 16, 1992, the district court, on cross-motions for summary judgment, entered judgment for Kestler. It based its opinion on its finding that Kestler had a vested right in the retirement plan, *Kestler*, 808 F.Supp. at 1222, and enjoined Boyles, Ducker and any individual members of the Board of Trustees of the Retirement System from enforcing any earnings cap against Kestler on its reasoning that the earnings limitation placed on Kestler, after his rights in the Retirement System became vested, unconstitutionally impaired his contractual rights because he stood to suffer significant reductions in his retirement benefits. The district court also concluded that the statute of limitations had not run when Kestler filed his suit and that the reduction was not reasonable and necessary to serve an important public purpose. It reasoned that the earnings cap would affect his benefits in 1991, when his earned income would exceed the earnings cap. *Kestler*, 808 F.Supp. at 1224-5.

The defendants present three issues in this appeal: whether Kestler's complaint is barred by the statute of limitations, N.C. Gen. Stat. 1-52; whether a contractual right exists; and whether any such contractual right was impaired, or whether any impairment was nonetheless constitutional. We now reverse the district court's order in

[4]The complaint also contains a count (II) under the state constitution and statutes and a count (III) on breach of contract. The district court did not consider the breach of contract count (III), saying it was "ancillary to and indeed dependent upon" the § 1983 claim. Neither did it consider count II.

favor of Kestler on the basis of *Griffin v. Board of Comm'rs*, 352 S.E.2d 882 (N.C. Ct. App.), *rev. denied*, 356 S.E.2d 776 (N.C. 1987).[6]

Initially, we note that the issue of whether a contract right exists is governed by state law, while federal law governs a determination that a contract has been impaired under the Contract Clause. *See Koch v. Yunich*, 533 F.2d 80, 86 (2nd Cir. 1976); *Baker v. Baltimore County, Md.*, 487 F.Supp. 461 (D. Md. 1980), *aff'd*, (table) 660 F.2d 488 (4th Cir. 1981).

The questions involved in this case have been considered directly in only one case in North Carolina. It is *Griffin v. Law Enf. Officers Ben. & Ret. Fund*, 352 S.E.2d 182 (N.C. Ct. App. 1987).

In *Griffin*, an officer of Mecklenburg County fell while on duty and sustained an injury to his shoulder in February, 1979. He returned to work but continued to have problems with the shoulder, which ultimately required surgery and caused his inability to work from time to time. After a second surgery on the shoulder in December of 1980, he did not work and applied for disability retirement on June 15, 1981. He was granted that disability retirement, effective September 1, 1981 by a letter dated September 11, 1981.

At the time the disability program was instituted, in 1979, there would have been no limit on Griffin's disability benefits, had he been eligible, which depended on his earnings. But on June 24, 1980, the General Assembly amended G.S. 143-166(y) to require disability retirement benefits to be reduced so that the sum of the employee's earnings and his disability benefits could not exceed what would have been his retirement benefits under more ordinary circumstances. Any difference was made up by reducing the retirement benefits from the part not paid for by the employee. Griffin claimed that the amendment could "not apply to him because his retirement rights had vested before those provisions were enacted, and that if the provisions are interpreted to affect his benefits, they are unconstitutional." 352 S.E.2d at 883. The court held that the application of the amendment

[6]We hold that there was no impairment of a contract because Kestler's rights had not vested until he retired. Thus we do not consider the other questions raised by the defendants on appeal.

to G.S. 143-166(y) was expressly determined by the retirement date of each employee and that "his rights were established not by his condition at a certain time, which is debatable, but by the date of his retirement which is not." *Griffin*, 352 S.E.2d at 884. The court then held that the defendant's rights had not vested until he retired. It stated "We know of no authority for the proposition that plaintiff's retirement rights vested before then." *Griffin*, 352 S.E.2d at 884.

The next case was *Simpson v. Government Emp. Retire. Sys.*, 363 S.E.2d 90 (N.C. Ct. App. 1987), which involved a similar, but not the same, question for two employees who had been employed for more than five years prior to the time they qualified for disability benefits. They took the disability benefits and then sued because there was a difference in the statutory method of computing them which had existed at the conclusion of five years' service and the method existing at the time of retirement. The case did not involve any earnings' cap, as did the *Griffin* case. The court held without explanation that their right to retirement benefits vested after five years of creditable service under G.S. 128-27(a)(1) and (c). *Simpson*, 363 S.E.2d 90, 91, n.2. The method of computation of their disability retirement on the fifth anniversary of their employment would have resulted in greater benefits than that which resulted after an amendment to chapter 128 of the statute, effective July 1, 1982. Both of the employees had become qualified by disability for disability benefits subsequent to July 1, 1982. However, had their physical condition enabled them to qualify earlier, they would have received a greater monthly payment.

Because the court held that these employees' rights to benefits had vested prior to the time the statute was amended, it held that their rights under the Contract Clause had been impaired. The court remanded the case to the trial court to ascertain whether or not the changes were reasonable and necessary to serve an important state interest under *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977).

The court did not explain any difference between its holding and that of *Griffin* and only stated that the State claimed that *Griffin* stood for the proposition that the General Assembly could make changes in vested rights. Of course, that claim was rejected by necessary implication, and, indeed, *Griffin* does not make such a holding.

As those cases apply to this action, *Griffin* is directly on point.[6] The court held that Griffin's rights did not vest until the date of his disability retirement, so Kestler's rights did not vest until his disability retirement, March 1, 1986. Kestler, having no vested right in retirement, then, so far as he was concerned, the legislative change of June 24, 1980, as later made effective to him, effective July 1, 1981, could have been made at any time prior to his retirement without reference to him and without violation of any contractual rights he may have had with the State under the Contract Clause of the Constitution. We are thus of opinion that Kestler has no claim under the contract clause because he did not have a vested right at the time this legislative change was made and became effective as to him. Any right he may have had was not vested until his disability retirement, March 1, 1986.

It is apparent from reading *Griffin* and *Simpson* that the holdings of those two cases may be inconsistent, but this seems less likely in view of the fact that one of the judges on the panel in each of those cases was the same. When we remember that *Simpson* did not explicitly overrule *Griffin*, nor even criticize the decision, of more force is the statement with respect to overruling by implication made by the Supreme Court of North Carolina in *Cole v. Cole*, 51 S.E.2d 491, 494 (N.C. 1949):

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[6]The district court, in choosing to follow the *Simpson* case rather than the *Griffin* case, explained that, "[n]owhere in *Griffin* does it reveal how long the plaintiff had been in service prior to the imposition of the earnings cap. Furthermore, . . . the plaintiff in *Griffin* did not . . . argue that the earnings cap violated the contract clause." *Kestler*, 808 F. Supp. at 1226. A review of the record in the *Griffin* case reveals that Griffin was employed by Mecklenburg County as a police officer "[f]or approximately 12 years prior to December 31, 1980." Complaint, *Griffin v. Board of Comm'rs of LEOBRF*, No. 84CVS918, record, at p.2. Also, the plaintiff's memorandum of law found in the record at p.71 argues both due process and contract clause violations. Thus, the court in *Griffin* was presented with very nearly the precise factual circumstances with which we are faced in the instant case. Moreover, we find it irrelevant whether Griffin sued for violations of his Due Process rights or his Contract Clause rights, because in either event, the *Griffin* court found that disability benefits vest upon retirement and not upon the completion of the five-year period of employment.

> A subsequent decision cannot, by mere implication, be held to overrule a prior case unless the principle is directly involved and the inference clear and impelling.

While the principles involved in *Griffin* and *Simpson* are similar, they are not the same. Neither is there any inference in *Simpson* that it overrules *Griffin*, clear or impelling or otherwise. With those thoughts in mind, we are of opinion that we should follow *Griffin*, a case on facts so similar to the case at hand as to be indistinguishable.

The order of the district court appealed from must be reversed and the case remanded for action not inconsistent with this opinion.

REVERSED AND REMANDED[7]

HALL, Circuit Judge, dissenting:

On August 16, 1979, Kestler celebrated his fifth anniversary on the police force, and the retirement plan did not include an earnings cap. The cap was added in 1980, and he retired on disability in 1986. The majority and I agree that events subsequent to "vesting" could not decrease Kestler's level of benefits; the only issue before us is whether, under North Carolina law, Kestler's benefits "vested" in 1979 or 1986. The majority relies solely on *Griffin*, whose facts parallel those in Kestler's case, in holding that the vesting occurred on retirement. *Griffin*, however, is in direct conflict with *Simpson*, and it is the latter case that dictates a ruling in Kestler's favor in this appeal. I respectfully dissent.

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[7]The district court held the statute of limitations had not run, but because of our disposition we have not decided that question. We note, however, that in two subsequent cases on facts apparently indistinguishable from *Simpson* the Court of Appeals held the statute of limitations had run. *Faulkenbury v. Retirement System*, 424 S.E.2d 420 (N.C. Ct. App. 1993), and *Woodard v. N.C. Local Gov. Emp. Ret. Sys.*, 424 S.E.2d 431 (N.C. Ct. App. 1993).

There simply is no way to reconcile the holdings in *Griffin*[1] and *Simpson*.[2] Although noting that "[w]hile the principles involved in *Griffin* and *Simpson* are similar, they are not the same. . . ," *ante* at 9, the majority fails to identify any differences beyond those in the factual settings. The principles involved are precisely the same, and the holdings are diametrically opposite. *Griffin* holds that a retiree receives the level of pension benefits calculated in accordance with the statute in existence at the time he actually begins to receive the benefits, *i.e.* at retirement, while *Simpson* holds that it is the computation method in effect when the employee has met the service requirements for future benefits, *i.e.* before retirement, that determines what level of benefits he will receive. Each panel designated the pivotal moment as the point of "vesting." The resolution of the appeal before us depends on the answer to a single question: Which case do we follow?

The opinions in *Griffin* and *Simpson* were written by different three-member panels[3] of North Carolina's intermediate appellate court. The majority cites *Cole* for the proposition that North Carolina requires a "clear and impelling inference" that an earlier case directly involving the same principle is being implicitly overruled.[4] While the opinion in *Simpson* may not have provided a sufficiently clear inference, its core ruling, and not *Griffin's*, was upheld when the same principle arose again in the same court five years later.

In *Faulkenbury v. Teachers' and State Employees' Retirement System of N.C.*, 424 S.E.2d 420, 426 (N.C. Ct. App. 1993), the Court of Appeals cited *Simpson* for the proposition that "a statute that diminishes the calculated benefit of an employee impairs that employee's contractual rights." As was the case in *Simpson* and *Griffin*, and is the

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[1]*Griffin v. Law Enf. Officers Ben. & Ret. Fund*, 352 S.E.2d 182 (N.C. Ct. App.), *appeal dismissed and disc. rev. denied*, 356 S.E.2d 776 (N.C. 1987).

[2]*Simpson v. Government Emp. Ret. Sys.*, 363 S.E.2d 90 (N.C. Ct. App. 1987), *aff'd mem.*, 372 S.E.2d 559 (N.C. 1988).

[3]Judge Cozort sat on both panels but did not write either opinion.

[4]*Cole* was decided well before there was an intermediate appellate court in North Carolina. The Court of Appeals was created in 1967. 1967 Sess. Laws c. 108, s. 1 (codified at N.C. Gen. Stat. § 7A-16 (1969)).

BEST AVA

case in this appeal, the statutory diminution of benefits occurred after the *Faulkenbury* plaintiffs had met the service requirements for "vesting" but before they had actually retired. The court held that the "plaintiffs had stated a valid claim for impairment of obligation of contract" under the first two prongs of the test set forth in *United States Trust Co. of N.Y. v. State of New Jersey*, 431 U.S. 1, 17-26 (1977).[8] 424 S.E.2d at 427. *Faulkenbury*, as the latest and clearest version of the Court of Appeals' view on the issue of vesting in the state employees retirement plan, states the rule in North Carolina with regard to the impairment issue in Kestler's case. *Griffin*, which reigned as precedent for eight months and was never heard of again except for a mention (while its holding was ignored) in the later *Simpson* opinion, is too slender a reed to support the majority's ruling. *Faulkenbury* is the law. I would, therefore, affirm the judgment of the district court.

[8]Under the *U.S. Trust* test, the court must ask the following questions: (1) Did the statute create a contractual obligation?; (2) Did the state legislature impair that obligation?; (3) Was the impairment "necessary and reasonable"? In *Faulkenbury*, the Court of Appeals held that the statutory change in benefits computation satisfied the first two prongs. The court did not, however, reach the "necessary and reasonable" issue.

VAILABLE COPY

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-1123

FILED 4/28/95

ANTHONY EDWARD KESTLER,
Plaintiff-Appellee,
versus
BOARD OF TRUSTEES OF NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, A BODY POLITIC AND CORPORATE; DENNIS DUCKER, DIRECTOR OF THE NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM (IN HIS OFFICIAL CAPACITY); HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA AND CHAIRMAN OF THE NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM (in his official capacity),
Defendants-Appellants,
and
NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, A CORPORATION; STATE OF NORTH CAROLINA,
Defendants.

O R D E R

Upon a request for a poll of the court on the petition for rehearing en banc, Judges Hall and Michael voted to rehear the case en banc, while Judges Ervin, Russell, Widener, Murnaghan, Wilkinson, Wilkins, Niemeyer, Hamilton,

Luttig, Williams and Motz voted against rehearing en banc.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel is of the opinion that the petition for rehearing is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is denied.

With the concurrence of Judge Russell.

/s/ H. E. Widener, Jr.
For the Court

Judge Hall dissents. He would grant rehearing for the reasons expressed in his dissenting opinion and affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
C-C-91-221-MU

FILED DEC. 16, 1992
U.S. DISTRICT COURT
W. DIST. OF N.C.

ANTHONY EDWARD KESTLER
Plaintiff

vs.

NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, a corporation; BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, a body politic and corporate; DENNIS DUCKER, Director of the North Carolina Local Governmental Employees' Retirement System (in his official capacity); HARLAN E. BOYLES, Treasurer of the State of North Carolina and Chairman of the Board of Trustees for the North Carolina Local Governmental Employees' Retirement System (in his official capacity), and THE STATE OF NORTH CAROLINA.
Defendants.

JUDGMENT

For the reasons given in the Opinion filed contemporaneously with this Judgment,

IT IS THE JUDGMENT OF THIS COURT that the defendants Boyles and Ducker, as well as the individual members of the Board of Trustees of the North Carolina Local

Governmental Employees' Retirement System, are hereby enjoined from enforcing any earnings cap against the plaintiff.

This 16th day of December, 1992.

/s/ Graham C. Mullen
GRAHAM C. MULLEN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
C-C-91-221-MU

FILED DEC. 16, 1992
U.S. DISTRICT COURT
W. DIST. OF N.C.

ANTHONY EDWARD KESTLER
Plaintiff

vs.

NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, a corporation; BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, a body politic and corporate; DENNIS DUCKER, Director of the North Carolina Local Governmental Employees' Retirement System (in his official capacity); HARLAN E. BOYLES, Treasurer of the State of North Carolina and Chairman of the Board of Trustees for the North Carolina Local Governmental Employees' Retirement System (in his official capacity), and THE STATE OF NORTH CAROLINA.
Defendants.

OPINION

THIS MATTER COMING ON TO BE HEARD AND BEING HEARD before the undersigned, the Honorable Graham C. Mullen, judge presiding over the October 1992 term of Federal District Court for the Western District of North Carolina, upon the plaintiff's Complaint and Petition for Declaratory Judgment. It appearing to the

Court that the plaintiff filed his Complaint and Petition for Declaratory Judgment on July 12, 1991 and therein alleged that certain limitations placed on his disability income as a former Mecklenburg County Police Officer are unconstitutional and constitute a breach of contract. The plaintiff seeks prospective injunctive relief against the State of North Carolina pursuant to 42 U.S.C. §1983.

The primary issue before the Court is whether the imposition of an earnings cap in a disability pension plan after the beneficiary vested in said plan violated the United States Constitution.

The plaintiff is represented by Fred W. DeVore, III and the defendants are represented by Alexander McC. Peters of the Office of the North Carolina Attorney General.

The parties have entered into certain stipulations which have been made a part of the record and which are undisputed. Based upon those stipulations, the Court makes the following Findings of Fact:

FINDINGS OF FACT

1. This is an action brought by a former Mecklenburg County Police Officer for a determination of his disability retirement rights.

2. The plaintiff Anthony Edward Kestler joined the Mecklenburg County Police Department on August 19, 1974.

3. As a county police officer he became a participant in a disability retirement plan known as the "Law Enforcement Officers' Benefit and Retirement Fund" (hereinafter known as "Retirement Plan").

4. The Retirement Plan benefits were established by N.C. Gen. Stat. §143-166 et. seq.

5. Under the Retirement Plan as it existed in 1973, before becoming eligible for disability Officer Kestler had to either have been an employee for ten years with five years membership in the retirement fund or become disabled on the job due to an incident which occurred after a year of full time service.

6. In 1979 the General Assembly amended the Retirement Plan by lowering the service requirement for disability from ten years to five years.

7. At the time he vested in the Retirement Plan, N.C. Gen. Stat. §143-166(y) read, in pertinent part, that an eligible employee, that is, one who suffered total and permanent disability and who filed an application for disability more than a year after the onset of his disability, shall:

> receive a basic disability retirement allowance equal to one and fifty-five one-hundredths percent (1.55%) of his average final compensation multiplied by the number of

years of creditable service which he would have had if he had continued in service until his fifty-fifth birthday. Average final compensation shall mean the average annual compensation of a member during the four consecutive years of membership service (48 consecutive employment months) that produce the highest average annual compensation.

8. Under the 1979 amendment, effective July 1, 1979, Officer Kestler vested after five years of service on August 16, 1979.

9. Prior to July 1, 1980, the Retirement Plan did not have a limitation on the earnings a disabled police officer could earn without having his disability retirement benefits reduced.

10. In 1980 the state legislature amended the statute governing the Retirement Plan, N.C. Gen. Stat. §143-166(y), by placing a limitation on the earnings a disabled police officer could earn in a non-state law enforcement occupation and still receive disability benefits.

11. In 1981 the state legislature passed legislation to exclude disabled retirees who retired prior to July 1, 1981 from the earnings limitation.

12. In 1983 the Retirement Plan became the Law Enforcement Officers'

Retirement System, but the provisions of the Retirement Plan did not change.

13. In October 1985 while on duty Officer Kestler was called to investigate a burglary. During his investigation he gave chase on foot to a suspect. During the chase Officer Kestler fell, severely injured his knee, and was unable to return to law enforcement duties.

14. In 1985, effective January 1, 1986, the Law Enforcement Officers' Retirement System was terminated and N.C. Gen. Stat. §143-166, et. seq. was repealed. The liabilities, obligations and functions under the Retirement Plan were transferred to the North Carolina Local Governmental Employees' Retirement System (hereinafter known as the "System"). The System was and is governed by N.C. Gen. Stat. §128-27, et. seq. The System became the assignee of the disability retirement plan in which the plaintiff was enrolled. The earnings cap placed on disabled employees under the prior Retirement Plan before it was terminated is identical to the earnings cap found in the System.

15. On or about March 1, 1986, Officer Kestler was declared permanently disabled from law enforcement work by the State Retirement Medical Board. Since that time he has received disability benefits.

16. After becoming disabled, Officer Kestler has worked on a part time or full time basis in an effort to supplement his disability income. However, from the time

of his injury until 1991, he has not earned more than the earnings cap placed on him by the challenged statutes.

17. In late 1990, Anthony Kestler was hired by Midwest Security to provide security for the federal courthouse on a contract basis. For the first time since his disability he earned more than allowed by the earnings cap and thus will receive reduced disability benefits.

The Court further adopts the stipulations submitted by the parties as Findings of Fact and hereby incorporates them by reference.

The Court is aware of the fact that there is litigation pending before the North Carolina Court of Appeals which may provide definitive guidance as to North Carolina law on some of the issues presented in the case before this Court. Ordinarily, the concepts of comity and federalism would require that this Court await the decision of the North Carolina Court of Appeals. Several opinion dates have passed, however, without an opinion being issued on those cases. As the Court feels that the parties are entitled to have this matter resolved, the Court issues this decision. The Court feels compelled to note that circumstances of this case only serve to highlight the need for a referral mechanism. After listening to arguments of counsel and considering the legal authority submitted by the parties, the Court makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1. Defendants argue that plaintiff's claims are barred by the Eleventh Amendment. The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend XI.

2. While the language of the Amendment expressly applies only to suits against a state by citizens of another state, the Supreme Court has long held that the Eleventh Amendment also bars suits against a state by citizens of that state. Papasan v. Allain, 478 U.S. 265, 276 (1986). "[I]n the absence of consent a suit in which the State or one of its agencies or departments is named as the defendants is proscribed by the Eleventh Amendment." Id. (quoting Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 100 (1985)). To determine whether an entity such as the System is an agency of the state and thus protected by Eleventh Amendment immunity, it becomes necessary to look to North Carolina law. See Huber, Hunt & Nichols v. Architectural Stone Co., 625 F.2d 22, 24 (5th Cir. 1980). Under North Carolina law, it is clear to the Court that the System is considered a state agency or instrumentality. Stanley

v. Retirement and Health Benefits Div., 66 N.C. App. 122, 310 S.E.2d 637 (1984). Thus, both the State of North Carolina and the System are immune from suit in this Court by virtue of the Eleventh Amendment.

3. Defendants concede, however, that under the Eleventh Amendment, the plaintiff can make a claim for declaratory and prospective injunctive relief against defendants Ducker and Boyles in their official capacities. Ex parte Young, 209 U.S. 123 (1908). In Young, the Court held that if a state official enforces an unconstitutional state enactment, the official is stripped of his official character, and may be subject to suit in federal court. Id. at 159-60. Young, however, has only been applied in cases where a violation of federal law by a state official is ongoing. Papasan, 478 U.S. at 277-78. Furthermore, relief which serves to compensate a party injured in the past by the act of a state official violating federal law has been held to be barred by the Eleventh Amendment. Id. at 278. "On the other hand, relief that serves directly to bring an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury." Id. This Court finds that the type of relief sought by the plaintiff in the instant case, prospective injunctive relief to bring an end to an ongoing violation of federal law by state officials, is precisely the type of relief permitted under Young, and is thus not barred by the Eleventh Amendment.

4. As to the defendant Board of Trustees of the System, this Court finds that the Eleventh Amendment does not bar prospective injunctive relief. While the plaintiff has named the Board of Trustees of the System as a defendant in this lawsuit, it is clear that he seeks to obtain injunctive relief against the individual officials who compose the Board of Trustees in their official capacities. While the Board of Trustees, as an agency or instrumentality of the state, cannot itself be sued, it is clear that its members can be sued in their official capacity for injunctive relief pursuant to Young. It would be a glorification of form over substance to require the plaintiff to name the Board members individually so as to elude the jurisdictional bar of the Eleventh Amendment. See Arthur v. Nyquist, 573 F.2d 134, 138-39 (2d Cir. 1978), cert. denied, 439 U.S. 860; Adamian v. Univ. of Nevada, 359 F.Supp. 825 (D. Nevada 1973), rev'd on other grounds, 523 F.2d 929 (9th Cir. 1975).

5. Notwithstanding any Eleventh Amendment concerns, defendants also contend that the defendants are not "persons" for purposes of liability under 42 U.S.C. §1983. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or

> other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C.A. §1983 (1981).

In Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989), the Supreme Court held that a state is not a person within the meaning of §1983. Will, 491 U.S. at 63. It is thus clear that the defendant State of North Carolina is not subject to liability under §1983.

6. Similarly, the suit against the System is essentially treated as a suit against the state, and, as such, it is also barred, as it is not a person under §1983.

7. Defendants again concede that defendants Ducker and Boyles can be subject to suit in their official capacities for declaratory and injunctive relief under §1983. Will, 109 S.Ct. at 2311 n.10.

8. The Board of Trustees, can also be property sued under §1983. The Board is composed of persons who, in their official capacities, administer the System. As explained above, injunctive relief should not be barred against a plaintiff who has, for whatever reason,

chosen not to name each member of the Board of Trustees individually in the complaint.

9. The plaintiff's claim that the defendants have violated his rights under the North Carolina Constitution is barred by the Eleventh Amendment. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984).

10. In addition to the Eleventh Amendment and §1983 defenses, the defendants argue that the plaintiff's claim is time barred, as the statutory amendment in question became effective on July 1, 1980, and the plaintiff did not file this lawsuit until 1991. The three-year limitation period established by N.C. Gen. Stat. §1-52 applies to this §1983 claim. See Wilson v. Garcia, 471 U.S. 261 (1985). Defendants argue that the statute of limitations began to run, at the latest, in April of 1987, when the plaintiff was for the first time required to report his previous year's earnings to the Local Retirement System pursuant to N.C. Gen. Stat. §128-27(e)(4). Defendants contend that when the plaintiff was first required to make this report, he was in possession of facts from which he could ascertain whether his alleged vested rights to receive benefits had been violated. Plaintiff points out, however, that if he had brought this lawsuit prior to the time when he was actually being paid above the earnings cap, the defendants would have successfully argued that the earnings cap, the defendants would have successfully argued that the lawsuit

be dismissed as not yet ripe for adjudication. In International Longshoremen's & Warehousemen's Union, Local 37 v. Boyd, 347 U.S. 222 (1954), the Supreme Court ruled that an action was not ripe when the plaintiffs "in effect asked the District Court to rule that a statute the sanctions of which had not been set in motion against individuals on whose behalf relief was sought, because an occasion for doing so had not arisen, would not be applied to them if in the future such a contingency should arise." Boyd, 347 U.S. at 224. Similarly, in the present case, the plaintiff could not have sued prior to 1991, for prior to that time, there was no way to determine that the amendment setting the earnings cap would even affect him in any way. Only when it became clear that he would exceed that earnings cap in 1991, did this lawsuit become ripe for adjudication. If the defendants' argument is followed, all officers participating in the System would have had to bring suit within three years after the amendment went into effect, incurring the expenses and burdens of litigation on the slight chance that they may one day become disabled and subsequently obtain employment in a job which offers earnings exceeding the cap. In the alternative, an officer who has become disabled would have to bring suit within three years after he first filed an earnings report with the Retirement System, on the chance that he may one day earn about the cap. Clearly, such lawsuits would be dismissed for lack of ripeness.

11. Defendants also argue that the plaintiff's claims are barred by the doctrine of laches. "The equitable doctrine of laches precludes the prosecution of stale causes of action if the party bringing the action lacks diligence." Newport News Shipbuilding & Dry Dock Co. v. Parker, 935 F.2d 20 (4th Cir. 1991). The defendant has the burden of proving lack of diligence on the part of the plaintiff and resulting prejudice. White v. Daniel, 909 F.2d 99 (4th Cir. 1990), cert. denied, 111 S.Ct. 2916 (1991). Lack of diligence may be shown "either by proof that the action was not commenced within the applicable statute of limitations or by facts otherwise indicating a lack of vigilance." Id. at 102. Prejudice to the defendant "is demonstrated by a disadvantage on the part of the defendant in asserting or establishing a claimed right or some other harm caused by detrimental reliance on the plaintiff's conduct. Id. The defendants have failed to demonstrate to the Court any detrimental reliance or that they were prejudiced in any way. Furthermore the defendants have not shown a lack of vigilance on the part of the plaintiff. Thus, the Court finds that the plaintiff's claims are not barred by the doctrine of laches.

12. Article 1, Section 10, Clause 1 of the United States Constitution prohibits states from enacting any law impairing the obligation of contracts.

13. Plaintiff contends that because the earnings cap was imposed after his contractual benefit became vested, it

violates the contract clause of the United States Constitution. The issue before the Court is whether the plaintiff has an enforceable contractual right which has been unconstitutionally impaired by the state. The test for making this determination is set forth in United States Trust Co. v. New Jersey, 431 U.S. 1 (1977). A court must ascertain: (1) whether a contractual obligation is present, (2) whether the state's actions impaired that contract, and (3) whether the impairment was reasonable and necessary to serve an important public purpose. United States Trust Co., 431 U.S. 1 (1977).

14. The two cases cited by both parties regarding this issue are Griffin v. The Board of Commissioners of the Law Enforcement Officers' Benefit and Retirement Fund, 84 N.C. App. 443, 352 S.E.2d 882, appeal dismissed, 319 N.C. 672, 356 S.E.2d 776 (1987), and Simpson v. Governmental Employees Retirement System, 88 N.C. App. 218, 363 S.E.2d 90 (1987), aff'd per curiam, 323 N.C. 362,372 S.E.2d 559 (1988). The Griffin case, decided in 1987, would seem at first glance to be directly on point. In Griffin, a disabled Mecklenburg County police officer sued the Board of Commissioners of the Law Officer's Retirement Fund, alleging that the same statute in question in the present case did not apply to him because his retirement rights vested prior to the enactment of the provisions. The North Carolina Court of Appeals, in ruling against the plaintiff, stated that:

> [W]e see no basis for plaintiff's argument that applying the act to him violates his constitutional rights. The legislation that first reduced the benefits of future disability retirees who work and earn money was enacted in 1980, more than a year before the plaintiff retired, and we know of no authority for the proposition that plaintiff's retirement rights vested before then.

Griffin, 84 N.C. App. at 445, 352 S.E.2d at 884.

Nowhere in Griffin does it reveal how long the plaintiff had been in service prior to the imposition of the earnings cap. Furthermore, it should be noted that the plaintiff in Griffin did not allege a §1983 claim or argue that the earnings cap violated the Contract Clause.

In Simpson, decided almost a year later, the North Carolina Court of Appeals dealt with the specific issue of "whether the pension rights of vested members of the [System] may be made subject to adverse legislative modification without violation of [the Contract Clause]," labeling it "a case of first impression in North Carolina." Simpson, 99 N.C. App. at 219, 363 S.E.2d at 91. Thus, it is apparent that Griffin did not address the issue which is presented in both Simpson and in the present case. The Simpson case dealt with N.C. Gen. Stat. §128-27(4), which sets forth the method of calculating

disability benefits under the System. After the fireman plaintiffs in Simpson became vested, the statute was modified so that the calculation resulted in a smaller retirement allowance for the plaintiffs. The plaintiffs in Simpson sought to have their benefits calculated according to the more favorable formula in effect at the time they became vested. The defendants made three arguments: (1) that Griffin stands for the proposition that the state can modify the disability retirement structure and apply the changes to vested members who have not yet retired on disability retirement at the time the changes came into effect, (2) that the state retains the power to modify or amend any of the provisions of the System, and (3) that even if there is a contract which has been impaired, that impairment is lawful because it is reasonable and necessary to serve an important public purpose. Id. at 221, 363 S.E.2d at 92.

After reviewing the law in other jurisdictions, the Simpson court specifically held that "the relationship between plaintiffs and the Retirement System is one of contract." Id. at 223, 363 S.E.2d at 93. The court noted that "[p]laintiffs, as members of [System], had a contractual right to rely on the terms of the retirement plan as these terms existed at the moment their retirement became vested." Id. at 224, 363 S.E.2d at 94. It should be noted that the court did not discuss the Griffin case at all, other than to note the defendants' reliance on it.

The defendants' attempts to distinguish Simpson are unconvincing. Applying the Simpson case, the Court finds that there is a contractual relationship.

15. Further, the Court finds that the earnings limitation placed on the plaintiff, after he became vested in the Retirement System, unconstitutionally impaired the contractual rights of the plaintiff inasmuch as the plaintiff stands to suffer significant reductions in his retirement benefits as a result of the legislative amendment under challenge.

16. Having found that the state's action impaired a contractual obligation, the next determination which this Court must make is whether the amendment was reasonable and necessary to serve an important public purpose. In Simpson, once the court found that a contract had existed and had been impaired, it went on to find that the issue of whether the amendment was reasonable and necessary to serve an important public purpose was not properly resolved in the court below. Id. at 225, 363 S.E.2d at 94. The defendants in Simpson, just like the defendants in the present case, argued that the challenged amendment was enacted primarily to correct inequities in the system. The court stated that it was "not persuaded that this explanation demonstrates or reflects that these changes were reasonable and necessary to serve an important state interest." Id. at 226, 363 S.E.2d at 95. There are two other cases since Simpson which have addressed the same issue: Faulkenbury v. Teachers' and State

Employees' Retirement System of North Carolina, et al., 90CVS12090 (Wake County), and Woodard, et al. v. North Carolina Local Government Employee's Retirement System, et al., 91CVS00368 (Wake County). In both of these cases, a superior court judge granted summary judgment in favor of the plaintiffs. The judge found that the change which was enacted to correct an inequity in the system was not reasonable and necessary.

The Faulkenbury and Woodard cases are currently on appeal, but a decision has yet to be rendered. The superior court's ruling in these cases directly addresses the argument that the defendants are making in the present case, that the amendment was made to correct an inequity. Thus, at this time, the status of the law in North Carolina is that an amendment that merely corrects an inequity is not considered reasonable and necessary to serve an important public purpose. Therefore, it is the conclusion of this Court that the defendants have failed to meet their burden of demonstrating that the amendment at issue was reasonable and necessary to serve an important public purpose.

17. Plaintiff's claim for breach of contract will not be discussed, as the Court finds that it is ancillary to and indeed dependent upon the plaintiff's §1983 claim.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that to the extent that legislation enacted after the vesting

of benefits by the plaintiff on August 16, 1976 in the Retirement Plan described above, its predecessors, successors and assigns, diminishes or restricts or limits the disability benefits that plaintiff would have received under the Retirement Plan in effect at the time he vested, said legislation is unconstitutional as violative of the Contract Clause of the United States Constitution.

IT IS FURTHER ORDERED that the defendants Boyles and Ducker, as well as the individual members of the Board of Trustees of the System, are hereby enjoined from enforcing any earnings cap against this plaintiff.

This 16th day of December, 1992.

/s/ Graham C. Mullen
Graham C. Mullen
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
C-C-91-221-MU

FILED MAY 4, 1992
U.S. DISTRICT COURT
W. DIST. OF N.C.

ANTHONY EDWARD KESTLER
Plaintiff

vs.

NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, a corporation; BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, a body politic and corporate; DENNIS DUCKER, Director of the North Carolina Local Governmental Employees' Retirement System (in his official capacity); HARLAN E. BOYLES, Treasurer of the State of North Carolina and Chairman of the Board of Trustees for the North Carolina Local Governmental Employees' Retirement System (in his official capacity), and THE STATE OF NORTH CAROLINA.
Defendants

STIPULATIONS

For the purposes of clarifying the issues and to promote judicial economy, the parties to the above-captioned action stipulate to the following:

1. This is an action brought by a former Mecklenburg County Police Officer

for a determination of his disability retirement rights.

2. The primary issue before the Court is whether Plaintiff has an enforceable right to receive disability retirement benefits free of the earnings limitation imposed by statute in 1980. Necessary to the resolution of this primary issue will be the resolution of the following issues:

a. Whether this action is barred by the statute of limitations;

b. Whether Plaintiff has a contract right recognized by state law and enforceable by this court, and if so, whether that contract right has been impaired;

c. If this action is not barred by the statute of limitations, and if a recognizable and enforceable contract right has been impaired, whether such impairment was unconstitutional.

3. Anthony Edward Kestler joined the Mecklenburg County Police Department on August 19, 1974. As a law enforcement officer employed by the Mecklenburg County Police Department, he became a participant in a retirement plan known as the "Law Enforcement Officers' Benefit and Retirement Fund" (hereinafter known as "LEOBRF"). LEOBRF was created and governed by the provisions of N.C. Gen. Stat. §143-166 (1974) (attached hereto as

"Exhibit A" and incorporated herein by reference).

4. When Officer Kestler was hired, he was given a copy of the "Rules and Regulations of the Law Enforcement Officers' Benefit and Retirement Fund and the Separate Benefit Fund" (hereinafter referred to as the "1973 Regulations"). (Attached hereto as "Exhibit B" and incorporated herein by referenced.) These 1973 Regulations had been adopted by LEOBRF's Board of Commissioners pursuant to the authority granted in N.C. Gen. Stat. §143-166(i).

5. The requirements and prerequisites for disability retirement that existed at the time that Officer Kestler first became a member of LEOBRF were contained in §5(3) of the 1973 Regulations (Exhibit B, Page 18).

6. In 1975, a new edition of the "Rules and Regulations of the Law Enforcement Officers' Benefit and Retirement Fund" was issued (hereinafter referred to as the "1975 Regulations") (attached hereto as "Exhibit C" and incorporated herein by reference). The 1975 Regulations contained no amendments that substantially affect the issues in this case.

7. On June 7, 1979, the North Carolina General Assembly ratified 1979 Sess. Laws, C. 838 (hereinafter referred to as "Chapter 838"), which included some amendments to the provisions of N.C. Gen. Stat. §143-166 (relevant sections of which

are attached hereto as "Exhibit D" and incorporated herein by reference). Among these amendments were that section 101 of Chapter 838 reduced the minimum number of years of creditable service required for an unreduced retirement benefit at age 55 to five years for members who were no longer law enforcement officers and who left their contributions in LEOBRF. Also, section 102 of Chapter 838 lowered the creditable service requirement for disability retirement from ten years to five years. Under Chapter 838, the relevant provisions of which were effective July 1, 1979, Officer Kestler obtained the necessary years of creditable service to be eligible to apply for disability retirement on August 16, 1979, six weeks after the effective date of the changes.

8. Prior to July 1, 1980, neither the 1973 Regulations or the 1975 Regulations, nor the governing statute, N.C. Gen. Stat. §143-166(y), placed a limitation on the earnings a disabled police officer could earn in a non law enforcement occupation without having his disability retirement benefits reduced.

9. On June 14, 1980, the North Carolina General Assembly enacted 1979 Sess. Laws (2nd Sess. 1980), C. 1215, (attached hereto as "Exhibit E" and incorporated herein by reference, and herein-after referred to as "Chapter 1215"), with an effective date of July 1, 1980, for employees retiring on or after July 1, 1980, and of July 1, 1991, for employees who had retired prior to July 1, 1980. Chapter 1215 placed a limitation on

the earnings from gainful employment that a recipient of disability retirement benefits could receive without forfeiting part or all of that portion of his disability benefits not funded by his own contributions.

10. On October 8, 1981, the North Carolina General Assembly enacted 1981 Sess. Laws, C. 975, (attached hereto as "Exhibit F" and incorporated herein by referenced, and hereinafter referred to as "Chapter 975"), to be effective upon ratification. Section 1 of Chapter 975, among other things, made the earnings limitation enacted by Chapter 1215 applicable only to those who retired after July 1, 1981, and also amended the formula for calculating the earnings limitation in a manner that allowed for greater earnings from gainful employment.

11. The earnings limitation originally imposed by Chapter 1215, essentially provides, as amended by Chapter 975 and as in effect at the present time, that if a recipient of disability retirement benefits engages in a gainful occupation for which he is paid more than the difference between his disability retirement allowance and his final gross compensation, as that term is defined and calculated by statute, then the portion of his disability benefit that is not produced by the disability retiree's contributions is to be reduced by the amount necessary to make the sum of his disability retirement benefits and his earnings equal to his final gross compen-sation. In other words, if his disability retirement

benefits and earnings together exceed his final compensation, then his disability retirement benefit is reduced by an amount equal to the amount of the excess.

12. On July 8, 1983, the North Carolina General Assembly enacted 1983 Sess. Laws, C. 468, (relevant portions of which are attached hereto as "Exhibit G" and incorporated herein by reference, and which is hereinafter referred to as "Chapter 468"), to be effective on the date of ratification. Section 1 of Chapter 468 changed the name of LEOBRF to "The Law Enforcement Officers' Retirement System" (hereinafter referred to as "LEORS").

13. On June 27, 1985, the North Carolina General Assembly enacted 1985 Sess. Laws, C. 479 (relevant portions of which are attached hereto as "Exhibit H" and incorporated herein by reference, and which is hereinafter referred to as "Chapter 479"). Section 196 of Chapter 479 provided, in part, that, effective January 1, 1986, the statutory provisions governing LEORS (N.C. Gen. Stat. §143-166 et seq.) were repealed, and all law enforcement officers employed by local governmental agencies were as of that date members of the North Carolina Local Governmental Employees' Retirement System (hereinafter referred to as "NCLGERS"). Pursuant to Chapter 479, section 196(u), various assets of LEORS were transferred to NCLGERS.

14. NCLGERS was and is governed by N.C. Gen. Stat. §128-27, et seq. The

earnings limitation placed on recipients of disability retirement benefits under LEORS immediately before it was terminated was identical to the earnings cap found in NCLGERS, which was and is set forth in N.C. Gen. Stat. §128-27(e)(1) (attached hereto as "Exhibit I" and incorporated herein by reference).

15. In October, 1985, while on duty, Officer Kestler was called to investigate a burglary. During his investigation he gave chase on foot to a suspect. During the chase, Officer Kestler fell, severely injuring his knee. He was unable to return to work with the police department as a result of that injury.

16. On or about February 18, 1986, Officer Kestler was declared permanently and totally incapacitated for the further performance of duty as a law enforcement officer with the Mecklenburg County Police Department and was approved for disability retirement effective March 1, 1986, by NCLGERS's Medical Board. Officer Kestler has remained disabled since the date of his injury. During this time he has received disability retirement benefits from NCLGERS.

17. Since his disability, Officer Kestler has worked on a part time or full time basis in an effort to supplement his disability check. Since the time of his injury, he has not earned more than the earnings limitation placed on him by the applicable statutes.

18. In late 1990, Anthony Kestler was hired by Midwest Security to provide security for the federal courthouse on a contract basis. For the first time since the incurrence of his disability, he may earn more than allowed without penalty by the earnings limitation.

Respectfully submitted, this 1 day of April, 1992.

/s/ Fred W. DeVore, III
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EXHIBIT A

G.S. 143-166 (1974)

Below are relevant portions of Exhibit A which was attached to the original stipulations.

§ 143-166. Law-Enforcement Officers' Benefit and Retirement Fund.

. . . (b) For the purpose of determining the recipients of benefits under this section and the amounts thereof to be disbursed and for formulating and making such rules and regulations as may be essential for the equitable and impartial distribution of such benefits to and among the persons entitled to such benefits, there is hereby created a board to be known as "The Board of Commissioners of the Law-Enforcement Officers' Benefit and Retirement Fund," which shall consist of the State Auditor, who shall be chairman ex officio of said Board, the State Treasurer, the State Insurance Commissioner, and four members to be appointed by the Governor and to serve at his will, one of whom shall be a sheriff, one a police officer, one from the group of law-enforcement officers as hereinafter

defined, employed by the State, and one representing the public at large. . . .

. . . (d) The said Board of Commissioners shall have control of all payments to be made from such fund. It shall hear and decide all applications for compensation and for retirement benefits created and allowed under this Article, and shall have power to make all necessary rules and regulations for its administration and government, and for the employees in the property discharge of their duties; it shall have the power to make decisions on applications for compensation or retirement benefits and its decision thereon shall be final and conclusive and not subject to review or reversal, except by the Board itself. . . .

. . . (i) The Board of Commissioners herein created shall have power and authority to promulgate rules and regulations and to set up standards under and by which it may determine the eligibility of officers for benefits under this Article, payable to peace officers who may be killed or become seriously incapacitated while in the discharge of their duty; such rules, regulations and standards shall include the amount of the benefits to be paid to the recipient in case of incapacity to perform his duty, as well as the amount to be paid such officer's dependents in case such officer is killed while in the discharge of his duty. The said Board is also authorized to promulgate rules and regulations and set up standards under and by which officers may be eligible for retirement and to determine

the amounts to be paid such officers as retirement benefits after it has been determined by the Board that such officers are so eligible.

In order for an officer to be eligible for retirement benefits under this Article, he shall voluntarily pay into the fund herein created a percentage of his monthly salary, which percentage shall be determined by the said Board: Provided, that any officer so voluntarily contributing to the fund herein created, who has become incapacitated in the line of duty, shall not be required to contribute to the fund during the period of his disability. . . .

. . . (j) All officers who have contributed to the retirement fund herein provided for, and who have at least 15 years of membership service in the fund, shall be eligible for retirement benefits. . . .

. . . (l) No officers as herein defined shall be eligible to the retirement benefits herein provided for until the expiration of five years from the date of the ratification of this Article. . . .

EXHIBIT B

The Rules and Regulations of the
Law Enforcement Officers'
Benefit and Retirement Fund
(1973)

Below are relevant portions of Exhibit B which was attached to the original stipulations.

. . .

BASIC DISABILITY RETIREMENT ALLOWANCE

(3) Upon the application of a member in service as an officer who has had 10 or more years of creditable service including at least five years of membership service, or upon the application of an active member who has completed one year of membership service and who has been totally and permanently incapacitated for duty as the nature and proximate result of an accident occurring while in the actual performance of duty at some definite time and place, provided such application is made not more than one year subsequent to the disabling accident or, if in receipt of compensation from the employer for more than one year following such accident, within 30 days after the cessation of such compensation, he may be retired by the Board on a basic disability retirement

allowance not less than 30 nor more than 90 days next following the execution and filing of such application, provided that the physician or physicians, appointed by the Board, after evaluating all essential statements and certificates pertaining to at least two medical examinations of such member, shall certify that he is mentally or physically totally incapacitated for the further performance of duty, that such incapacity is likely to be permanent, and that such member should be retired. . . .

EXHIBIT C

The Rules and Regulations of the
Law Enforcement Officers'
Benefit and Retirement Fund
(1975)

There are no relevant portions of Exhibit C, which was attached to the original stipulations.

EXHIBIT D

1979 Sess. Laws, C. 838, ss. 101-2

Below are relevant portions of Exhibit D which was attached to the original stipulations.

. . .

REDUCE VESTING PERIOD FOR DISABILITY BENEFIT ENTITLEMENT IN LAW ENFORCEMENT OFFICERS' BENEFIT AND RETIREMENT FUND.

Sec. 102. G.S. 143-166(y) is rewritten to read:

. . . Any member who is less than 55 years of age with five or more years of creditable service and who has been totally and permanently incapacitated for duty, or any member who is less than 55 years of age with one or more years of membership service and who has been totally and permanently incapacitated for duty as the nature and proximate result of an accident occurring while in the actual performance of duty at some definite time and place may, upon application of the member or his employer, be retired by the board of commissioners on a basic disability retirement allowance as is set forth below. . . .

EXHIBIT E

1979 Sess. Laws, (2nd Sess. 1980), C. 1215

Below are relevant portions of Exhibit D which was attached to the original stipulations.

S.B. 1008 CHAPTER 1215

AN ACT TO PROVIDE THE REDUCTION IN DISABILITY RETIREMENT BENEFITS TO REEMPLOYED MEMBERS OF THE LAW ENFORCEMENT OFFICERS BENEFIT AND RETIREMENT FUND OR MEMBERS WHOSE EARNING CAPACITY HAS IMPROVED.

The General Assembly of North Carolina enacts:

Section 1. G.S. 143-166(y) as it appears in the 1979 Supplement to Volume 3C of the General Statutes is amended by adding a new paragraph between the fourth and fifth paragraphs to read as follows:

"On or after July 1, 1980, should the Board of Commissioners determine that such disability beneficiary is engaged in or is able to engage in a gainful occupation paying more than the difference between the basic disability retirement allowance not provided by the member's contributions shall be reduced to an amount which

together with the portion of the basic disability retirement allowance provided by the member's contributions and the amount earnable by him, shall equal the amount of his average final compensation. Should his earning capacity be later changed, the portion of his basic disability retirement allowance not provided by the member's contributions may be further modified: Provided that the new allowance shall not exceed the allowance originally granted nor an amount which, when added to the amount earnable by the member together with the portion of the basic disability retirement allowance provided by the member's own contributions, equals his average final compensation."

Sec. 2. This act shall become effective on July 1, 1980, for employees retiring on or after July 1, 1980. For employees retiring prior to July 1, 1980, this act shall become effective on July 1, 1981. . . .

EXHIBIT F

1981 Sess. Laws, C. 975

Below are relevant portions of Exhibit F which was attached to the original stipulations.

S.B. 261 CHAPTER 975

AN ACT TO INDEX TO THE CONSUMER PRICE INDEX THE EARNABLE DIFFERENCE FOR DISABILITY BENEFICIARIES OF THE STATE ADMINISTERED RETIREMENT PROGRAMS.

The General Assembly of North Carolina enacts:

Section 1. G.S. 143-166(y) is amended by rewriting the sixth paragraph to read:

"On and after July 1, 1981, the Board of Commissioners shall determine whether a disability beneficiary who retired after July 1, 1981, is engaged in or is able to engage in a gainful occupation paying more than the difference, as hereinafter indexed, between his basic retirement allowance and the gross compensation earned as a law enforcement officer during the 12 consecutive months in the final 48 months of service prior to retirement producing the highest gross compensation, excluding any

compensation received on account of termination. If the disability beneficiary is earning or is able to earn more than the difference, the portion of his basic disability retirement allowance not provided by his contributions shall be reduced to an amount which, together with the portion of the basic disability retirement allowance provided by his contributions and the amount earnable by him shall equal the amount of his gross compensation prior to retirement. . . .

EXHIBIT G

1983 Sess. Laws, C. 468

Below are relevant portions of Exhibit G which was attached to the original stipulations.

S.B. 293 CHAPTER 468

AN ACT TO AMEND THE LAWS GOVERNING THE LAW ENFORCEMENT OFFICERS' BENEFIT AND RETIREMENT FUND SO AS TO RECEIVE A FAVORABLE DETERMINATION AS A QUALIFIED TRUST BY THE INTERNAL REVENUE SERVICE AND TO THEN CAUSE A TAX SHELTERING FROM CURRENT INCOME OF MEMBERS' CONTRIBUTIONS.

The General Assembly of North Carolina enacts:

Section 1. G.S. 143-166 and G.S. 143-166.01 are amended by deleting the phrase "LAW ENFORCEMENT OFFICERS' BENEFIT AND RETIREMENT FUND" from the title and substituting in lieu thereof the phrase "LAW ENFORCEMENT OFFICERS' RETIREMENT SYSTEM"; by deleting the phrase "Law Enforcement Officers' Benefit and Retirement Fund" from the captions and substituting in lieu thereof the phrase "Law Enforcement Officers' Retirement System"; by deleting the phrase "Law-Enforcement Officers' Benefit and Retire-

ment Fund" wherever it appears and substituting in lieu thereof the phrase "Law Enforcement Officers' Retirement System"; and by deleting the phrase "Retirement Fund" wherever it appears and substituting in lieu thereof the phrase "Retirement System".

Sec. 2. G.S. 143-166 and G.S. 143-166.01 are amended by deleting the phrase "Board of Commissioners" wherever it appears and by substituting in lieu thereof the phrase "Board of Trustees".

EXHIBIT H

1985 Sess. Laws, C. 479, s. 196

Below are relevant portions of Exhibit H which was attached to the original stipulations.

. . .

"On and after January 1, 1986, the creditable service of a member who was a member of the Law Enforcement Officers' Retirement System at the time of the transfer of law enforcement officer employed by participating employers from the System to this Retirement System and whose accumulated contributions are transferred from that System to this Retirement System, includes service that was creditable in the Law Enforcement Officers' Retirement System; and membership service with that System is membership service with this Retirement System; provided, notwithstanding any provisions of this Article to the contrary, any inchoate or accrued rights of such a member to purchase creditable service for military service, withdrawn service and prior service under the rules and regulations of the Law Enforcement Officers' Retirement System may not be diminished and may be purchased as creditable service with this Retirement System under the same conditions that would have otherwise applied.". . .

EXHIBIT I

G.S. 128-27(e)(1)

Below are relevant portions of Exhibit I which was attached to the original stipulations.

. . .

(e) . . .

. . . (1) The Board of Trustees shall determine whether a disability beneficiary is engaged in or is able to engage in a gainful occupation paying more than the difference, as hereinafter indexed, between his disability retirement allowance and the gross compensation earned as an employee during the 12 consecutive months in the final 48 months of service prior to retirement producing the highest gross compensation excluding any compensation received on account of termination. If the disability beneficiary is earning or is able to earn more than the difference, the portion of his

disability retirement allowance not provided by his contributions shall be reduced to an amount which, together with the portion of the disability retirement allowance provided by his contributions and the amount earnable by him shall equal the amount of his gross compensation prior to retirement. . . .

The provisions of this subdivision shall not apply to beneficiaries of the Law Enforcement Officers' Retirement System transferred to this Retirement System who commenced retirement on and before July 1, 1981.